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A Law Corporation

LAND USE COMMISSION
STATE OF HAWAII

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BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition of: MAUI LANI) DOCKET NO. DR14-51
NEIGHBORS, INC., for Declaratory Order)
Under §§ 15-15-98 *et seq.* of the Land Use) **A&B PROPERTIES, INC.'S MEMO-**
Commission Rules and Hawai'i Revised) **RANDUM RE: PETITIONER**
Statutes § 91-8) **MAUI LANI NEIGHBORS, INC.'S**
) **PETITION FOR DECLARATORY**
Affected Landowner and Property: State of) **ORDER FILED OCTOBER 6, 2014;**
Hawai'i, by and through its BOARD OF) **REQUEST FOR CONTESTED**
LAND AND NATURAL RESOURCES; Lot) **CASE HEARING AND NOTICE**
12-A-3 of the Maui Lani Subdivision; Subd.) **OF INTENT TO INTERVENE AND**
File No. 3.2226; TMK No.: (2) 3-8-007:104) **CERTIFICATE OF SERVICE**
_____)

**A&B PROPERTIES, INC.'S MEMORANDUM RE: PETITIONER
MAUI LANI NEIGHBORS, INC.'S PETITION FOR DECLARATORY
ORDER FILED OCTOBER 6, 2014; REQUEST FOR CONTESTED
CASE HEARING AND NOTICE OF INTENT TO INTERVENE**

Comes now, A&B PROPERTIES, INC. ("A&B"), by and through its attorneys,
MATSUBARA – KOTAKE, and hereby submits its Memorandum Re: Petitioner Maui

Lani Neighbors, Inc.'s Petition for Declaratory Order filed October 6, 2014; Request for Contested Case Hearing and Notice of Intent to Intervene.

I. INTRODUCTION

A&B requests that the Petition for Declaratory Order be set for hearing. The allegations contained in the Petition for Declaratory Order are technical in nature and require the taking of evidence in a contested case proceeding so that all parties may have an opportunity to protect any property interest arising from the subject matter.

II. BACKGROUND

On August 25, 2010, A&B filed its Petition for District Boundary Amendment to reclassify approximately 545.229 acres in central Maui from the State Agricultural District to the State Urban District for a master planned community, known as Waiale, including village mixed use, commercial, business/light industrial, multi-family and single-family residential, community center, regional and neighborhood park, greenway and open space, cultural preserves, middle school, and related infrastructure ("A&B's Petition").

On June 21, 2012, the Land Use Commission, State of Hawai'i ("LUC") issued its Findings of Fact, Conclusions of Law and Decision and Order in Docket No. A10-789 ("Decision and Order") approving A&B's Petition.

On June 26, 2014, A&B sold a portion of the 545.229 acres of Petition Area in Docket No. A10-789 to the State Department of Land and Natural Resources' ("DLNR"), comprising of approximately 65.378 acres, for the development of a public park.

On September 2, 2014, Maui Lani Neighbors, Inc. ("MLN") filed a civil action in the Second Circuit Court entitled *Maui Lani Neighbors, Inc., vs. State of Hawai'i, et al.*, Civil No. 13-1-0646(2), to challenge the DLNR's development of the public park. One of MLN's legal claims alleges that the public park violates certain conditions of the A10-789 Decision and Order.

On October 6, 2014, MLN filed with the LUC its Petition for Declaratory Order in this docket, DR14-51, alleging that certain conditions in the A10-789 Decision and Order have been violated. MLN's petition explains that the Second Circuit Court action is pending and that both the court action and the LUC petition are related and may affect each other.

On October 29, 2014, the Second Circuit Court entered its Order Denying in Part Defendant County of Maui's Motion to Dismiss Plaintiff's First Amended Complaint Pursuant to HRCP Rule 8 or in the Alternative HRCP Rule 12(B)(6), Staying all Further Activities and Proceedings in this Matter, and for Deferral to the State of Hawaii Land Use Commission ("Court Order").

The Court Order stayed the court proceeding pending the LUC's determination of whether there is any violation of the conditions contained within the A10-789 Decision and Order.

III. DISCUSSION

MLN's Petition for Declaratory Order was filed under Subchapter 14 of the LUC's rules at §§ 15-15-98 et seq. of the Hawai'i Administrative Rules ("HAR").

HAR § 15-15-100(a) provides that the LUC shall, within ninety days of filing a petition for declaratory order, either (1) deny the petition, (2) issue the declaratory order or (3) set the matter for hearing.

Based upon the October 6, 2014 filing date, an initial decision under HAR § 15-15-100(a) is required by January 4, 2015 (ninety days following October 6, 2014). This initial decision should be to set the allegations and issues presented in MLN's Petition for Declaratory Order for contested case hearing because a more thorough hearing is required to ensure the participation of all interested parties and to develop an evidentiary record that would enable the LUC to make a decision regarding the issues presented.

MLN's Petition for Declaratory Order alleges violations of Conditions 5, 8, 16, 21 and 24 of the A10-789 Decision and Order. These Conditions relate to highways improvements, hazardous wildlife attractants, endangered species, compliance with representations and annual reports. Allegations relating to compliance with representations include alleged violations relating to surface run off calculations, drainage plans, retention basins, future entitlements, and park uses.

A&B generally denies any and all allegations of any violation of the Conditions in A10-789. A&B cannot speak for the actions by the DLNR, but A&B reserves its rights and

denies and disputes any allegations of any actions or omissions on the part of A&B or any person that give rise or may give rise to any violation of condition or which may affect any of A&B's rights under the Decision and Order. A&B also denies and disputes MLN's interpretation of the Conditions in A10-789.

The Conditions, along with the findings, conclusions and order in the Decision and Order entered on June 21, 2012 in Docket No. A10-789, are based upon a contested case evidentiary hearing held on three days on February 16, 2012, February 17, 2012, and April 4, 2012, wherein the LUC admitted into evidence exhibits and testimony, including A&B's Final Environmental Impact Statement and approximately fourteen studies and reports prepared by experts in their fields, together with expert testimony.

The studies and reports are technical in nature and include but are not limited to a geological reconnaissance survey, aquatic survey, flora and fauna survey, archaeological inventory survey, cultural impact assessment, traffic impact analysis report, acoustic study, air quality study, environmental site assessment, preliminary engineering and drainage report, market study, assessment of economic and fiscal impacts, and solid waste management plan.

MLN's allegations appear to concern at least the flora and fauna survey, traffic impact analysis report and preliminary engineering and drainage report, along with testimony relating to those reports and studies. The subject matter and the nature of the

allegations are technical in nature and require an evidentiary hearing to evaluate and address.

Also, the Decision and Order in A10-789, which is based on evidence submitted by A&B, the Maui Planning Department and the State Office of Planning, constitutes A&B's right to proceed with further entitlements and eventual construction of its master planned community. Any alleged violation of the Decision and Order could directly impact A&B's real property rights. Given A&B's property interest in the Decision and Order, A&B hereby requests a contested case hearing. *See Pele Defense Fund v. Puna Geothermal Venture*, 77 Haw. 64, 68, 881 P.2d 1210, 1214 (1994) (Constitutional due process protections mandate a hearing whenever the claimant seeks to protect a property interest, in other words, a benefit to which claimant is legitimately entitled).

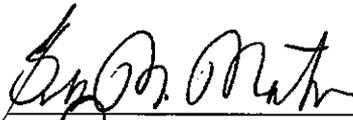
A&B also gives notice of its intent to intervene in the event this matter is set for hearing.

HAR § 15-15-100(a)(3) provides that if the petition for declaratory order is set for hearing, that the procedures set forth in subchapter 7 of the LUC rules shall be applicable. Subchapter 7 provides procedures for agency hearing and post hearing procedures, including but not limited to the notice of hearing, notice of intent to intervene, and intervention in other than district boundary amendment or important agricultural lands designation proceedings.

IV. CONCLUSION

Given the technical nature of the MLN's allegations, the necessity for an evidentiary record and the need to protect property rights arising from the Decision and Order in A10-789, A&B requests that the Petition for Declaratory Order be set for contested case hearing.

DATED: Honolulu, Hawai'i, November 12, 2014.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a file-marked copy of the foregoing document was duly served upon the following **AS INDICATED** on November 12, 2014:

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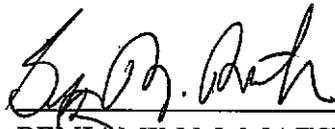
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DATED: Honolulu, Hawai'i, November 12, 2014.



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